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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)
for Commercial Broadcast and Instructional)
Television Fixed Service Licenses)

MM Docket No. 97-234

To: The Commission

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, respectfully submits its comments in response to the *Notice of Proposed Rule Making* ("Notice") in the above-referenced proceeding. These comments focus on the *Notice*'s request for public input on ways in which the Commission can constitutionally further minority participation in broadcast ownership through its auction rules. As explained below, Sinclair believes the Commission should forego the constitutionally suspect concept of bidding credits for minorities in broadcast auctions in favor of a more broad-based regulatory approach that permits the "incubation" of minority-controlled broadcast companies through support by experienced and well-capitalized non-minority companies.

Discussion

Sinclair owns or provides programming services to 29 television stations located in 21 markets throughout the country, making it the nation's largest group television operator in terms

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of number of stations owned or programmed. Sinclair is a publicly traded corporation with a market capitalization in excess of two billion dollars.

As the *Notice* points out, the Commission has long been committed to encouraging minority participation in the broadcast industry. The *Notice* expresses the Commission's continuing concern "about the under[re]presentation of minorities as owners of broadcast stations and the implications for program diversity." *Notice*, para. 86.

Sinclair shares the Commission's concern. However, Sinclair does not believe that the devices the Commission has historically used to promote minority broadcast ownership -- the tax certificate and distress sale policies and the minority comparative hearing credit, for example -- have meaningfully achieved that goal. More often than not, these policies have resulted in participation by "quick buck" artists interested in selling their stations for a fast profit rather than serious minority broadcasters who are committed to ownership for the long term. Rather, Sinclair believes that the best solution for increasing lasting minority participation in broadcast ownership is to adopt policies that encourage the "incubation" of minority broadcasters through support by non-minority companies. Sinclair has committed itself to this process through its relationship with Glencairn, Ltd., a minority-controlled company with which Sinclair has local marketing agreements in six medium-to-large television markets.^{1/} As a result of this relationship, minority ownership of television stations exists in six markets where none had existed before. Through its local marketing agreements with Sinclair, Glencairn is assured a steady, predictable stream of revenue while being largely relieved of the necessity to make heavy and risky investments in television programming. Over time, this arrangement will allow

^{1/} Those markets are: Baltimore, Maryland; Milwaukee, Wisconsin; Raleigh-Durham, North Carolina; Birmingham, Alabama; San Antonio, Texas; and Asheville, North Carolina-Greenville-Spartanburg-Anderson, South Carolina.

Glencairn to solidify and eventually expand its programming and public service capabilities, as well as its station portfolio.

In its *Notice*, the Commission makes clear its intent to do what it can to further minority ownership of broadcast facilities through its rules for broadcast auctions. *See Notice*, para. 87. Sinclair certainly does not take issue with the spirit of that proposal. However, Sinclair respectfully suggests that minority bidding credits and similar adjustments to the auction process are unlikely to pass constitutional muster, and are no more likely to further lasting minority ownership in broadcasting than did the Commission's prior policies. The solution, Sinclair submits, lies in adopting policies in *other* rulemaking contexts (*i.e.*, multiple ownership and attribution) that encourage "incubation" of minority broadcasters by non-minority companies which have operational experience and capital to offer.

In the first place, Sinclair cannot conceive of a way in which bidding credits for minority-owned companies can survive constitutional scrutiny in light of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Commission has attempted minority bidding credits before, in the PCS auctions, only to see them stricken down as unconstitutional. In Sinclair's view, any attempt by the Commission to establish a bidding credit that favors minorities in broadcast auctions -- no matter how carefully structured -- will lead to constitutional challenges to the auction rules, followed by years of litigation in appellate courts. In the meantime, nothing will have been accomplished in the auction context to increase minority broadcast ownership.

Moreover, even if a bidding credit favoring minorities survives judicial review, such a credit is unlikely to meaningfully further long-term minority ownership in the broadcast industry. Unless the Commission adopts a fairly strict definition of what a "minority" company is, it risks

a return to the comparative hearing days of gamesmanship, where a putatively controlling minority is recruited as a “front” with little financial stake and little voice in the applicant’s affairs. The *Notice* anticipates this likelihood, proposing an eligibility standard for a bidding credit that would require minorities not only to have voting control of the applicant, but also to own more than 50% of the enterprise’s equity on a fully-diluted basis. While such a standard would work to weed out minority “fronts,” the problem is that very few minorities have the resources or the track record in broadcasting that would allow them to achieve a more than 50% capital investment in a company. This is particularly true in the television context, where the value of a license runs into the millions of dollars even in small markets. In short, encouraging minority broadcast ownership through the auction process is not likely to succeed, even if the means utilized could survive judicial scrutiny. Minority bidding credits would either lead once again to the proliferation of minority “front” applicants, or conversely, would garner few if any applicants who are eligible for a credit.

In sum, while Sinclair completely supports the objective of increasing minority broadcast ownership, it does not believe that the rules for broadcast auctions are the mechanism for achieving that goal. The only realistic path to meaningfully increasing long-term minority participation in broadcast ownership is a broad-based regulatory policy that encourages the incubation of minority broadcasters by non-minority companies. Such a policy not only should encourage programming/operational support and cost savings to the minority owner through local marketing agreements, as Sinclair has accomplished through its relationship with Glencairn, but should also encourage financial support by the non-minority company through debt and equity investment. The rule changes to foster such a policy must transcend the broadcast auction context. They should include relaxation of the multiple ownership rules and

attribution policies for non-minority companies who seek to incubate minority owners. Only then will the Commission have created a regulatory environment that truly enhances the opportunities for minority owners not only to enter the broadcast industry, but to remain there.

Respectfully submitted,

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